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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM MOTTO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

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QUESTIONS PRESENTED

1. May the government bolster the credibility of accomplice witnesses by eliciting testimony during their direct examination that their plea agreements require them to take polygraph examinations if they do not testify truthfully?

2. May this conviction be upheld in light of the trial court's jury instruction that in order to convict the petitioner of a continuing criminal enterprise charge, the jury must find him guilty of the conspiracy charged in the indictment when the government conceded that the petitioner was not a manager or supervisor in the conspiracy?

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WILLIAM MOTTO respectfully petitions this Court for a writ of certiorari to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered on December 30, 1986, upholding a prison sentence imposed on him for violation of 21 U.S.C. Section 848, the continuing criminal enterprise statute.

OPINIONS BELOW

The Judgment Order filed on December 30, 1986 appears in the Appendix at A-1.

JURISDICTION

The Judgment Order affirming the judgment of the District Court was entered on December 30, 1986. This Petition is filed timely pursuant to Rule 20.1, Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATUTES INVOLVED

21 U.S.C. Section 848 provides in pertinent part that,

A person is engaged in a continuing criminal enterprise if he violates any [felony] provision of [the federal drugs laws] and such violation is part of a series of violations . . . which are undertaken by such person in concert with five or more other persons with respect to whom [he] occupies a supervisory position . . . and from which [he] obtains substantial income or resources.

21 U.S.C. Section 846 provides, "Anyone who conspires to commit any violation of the federal drug laws" is guilty of a separate crime of conspiracy.

STATEMENT OF THE CASE

1. *The Reference to the Polygraph Provision of the Plea Agreement.* In the direct examination of the first witness, the government elicited testimony from Kenneth Weidler, a cooperating co-defendant, that his plea agreement required, "If I told a lie I would be subject to a lie detector test." Defense counsel moved for a

mistrial as such testimony improperly bolstered the credibility of the government witness. The court denied the motion, ruling that such testimony was important in assessing the credibility of the government's witnesses. Thereafter, all parties subsequently made repeated reference to the polygraph provision of these witnesses' plea agreements.

2. *The Relationship of the Conspiracy Charge to the Enterprise Charge.* Petitioner was convicted of a conspiracy to distribute cocaine as charged in Count One of the indictment, possession of cocaine with the intent to distribute on or about Labor Day weekend, September, 1984, and with conducting a continuing criminal enterprise. The government theory at trial was that the petitioner, William Motto, was a preferred customer in the conspiracy charged which was managed and directed by unindicted co-conspirator Lawrence Lavin. It was uncontested that petitioner was not an owner, manager, or supervisor of the Lavin cocaine ring charged in Count One of the indictment, but that he managed a distinct cocaine distribution network as charged in the continuing criminal enterprise count.

In the charge to the jury, the applicable portion of which appears at Appendix A-4 through A-7, the trial judge on two instances instructed the jury that to find the petitioner guilty of the continuing criminal enterprise charge, they must find him guilty of a series of violations, one of which must be the conspiracy charged in Count One of the indictment. The jury convicted on both the conspiracy charge and the enterprise charge, but the court did not ask the jury by way of special interrogatories to identify what the three predicate offenses were which the jury utilized to support the enterprise conviction.

On appeal, the panel affirmed defendant's conviction by Judgment Order.

Petitioner remains incarcerated, having been denied bail following his indictment.

REASONS FOR GRANTING THE WRIT

1. **The Third Circuit Order Affirming Petitioner's Conviction Conflicts With the Decisions of the Eleventh, Ninth, and Seventh Circuits Requiring That Such References to the Polygraph Provision of a Cooperating Witness' Plea Agreement Deprive a Defendant of a Fair Trial Requiring Reversal.**

Twelve of the government's witnesses who were each alleged to be co-conspirators testified pursuant to negotiated plea agreements. Each of these plea agreements contained an identical provision that at the government's option they would be required to take a polygraph examination to verify the accuracy of their testimony and the truthfulness of their disclosures to the government. In affirming the trial court's ruling that reference to the polygraph provision was relevant and admissible, the panel reached a result that conflicts with all of the reported decisions on this issue.

In all instances where courts have considered admission of the fact that a government witness' plea agreement requires a polygraph as a verification of his truthfulness, courts have universally held that such testimony is prejudicial as it improperly bolsters the witness' credibility and deprives the defendant of a fair trial. Most recently, the Eleventh Circuit in *United States v. Hilton*, 772 F.2d 783 (11th Cir. 1985), held that evidence of a witness' willingness to submit to a polygraph examination was not only inadmissible but deprived defendant of a fair trial requiring reversal. *See also United States v. Brown*, 720 F.2d 1059 (9th Cir. 1983): prosecution testimony that a provision in witnesses' plea agreements required them to submit to polygraph examinations impermissibly vouched for the credibility of the witnesses; and *United States v. Bursten*, 560 F.2d 779 (7th Cir. 1977), which condemned the introduction of

written plea agreements containing a polygraph examination clause even where the trial testimony did not emphasize the examination.

The issue thus raised is not an esoteric one unique to this case. The provision of the plea agreement concerning a polygraph examination is routinely included in plea agreements both in the District in which the case was prosecuted and throughout the country. The prosecution tactic of bolstering the credibility of an accomplice witness raises a serious due process issue as throughout the trial the court indicated that references to the polygraph examination were relevant. This severely prejudiced the petitioner whose primary defense was an attack on the credibility of the government witnesses.

2. The Third Circuit's Decision Upholding the Conviction in Light of the Court's Charge That the Jury Must Find That the Conspiracy Charged in Count One Was a Predicate for the Enterprise Charge in Count Fifty-Six Raises an Important Question of Federal Law Which Has Not Been But Should Be Settled By This Court.

The relationship between a conspiracy charge in violation of 21 U.S.C. Section 846 and an enterprise charge under 21 U.S.C. Section 848 has troubled federal courts since the passage of the enterprise statute. The Circuit and District Courts have grappled with the questions of whether a conspiracy charge under Section 846 is a lesser included charge under the enterprise statute, and whether the "in concert" requirement of the enterprise statute is synonymous with the conspiratorial agreement which is an element of the Section 846 charge.

This Court in *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), interpreted the in concert language in the enterprise statute to mean to conspire with as utilized in 846 statute. Subsequent to

the *Jeffers* decision, numerous Circuit Courts interpreted that decision to hold that a coterminous 846 charge was a lesser included offense raising double jeopardy issues as to whether a conspiracy charge could serve as a predicate offense for purposes of establishing a series of violations within the meaning of 21 U.S.C. 848(b)(2), and whether the offenses merged for sentencing purposes. See *United States v. Lurz*, 666 F.2d 69 (4th Cir. 1981), *cert. denied* 455 U.S. 1005, 103 S.Ct. 1642 (1981); *United States v. Aiello*, 771 F.2d 621 (2nd Cir. 1985); *United States v. Leifried*, 732 F.2d 388 (4th Cir. 1984); *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1981), *cert. denied* 105 S.Ct. 133 (1983); *United States v. Graziano*, 710 F.2d 691 (4th Cir. 1983), *reh. denied* 720 F.2d 688, *cert. denied* 104 S.Ct. 1910 (1983); *United States v. Smith*, 703 F.2d 627 (D.C. Cir. 1983); *United States v. Michel*, 588 F.2d 986 (5th Cir. 1979), *cert. denied* 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979); *United States v. Barnes*, 604 F.2d 121 (2nd Cir. 1979), *cert. denied* 446 U.S. 907, 100 S.Ct. 1833 (1980).

This Court again addressed the issue of the relationship between a conspiracy charge and an enterprise charge in *Garrett v. United States*, 105 S.Ct. 2407 (1985), for both double jeopardy and sentencing purposes. However, this case, as well as *Jeffers v. United States*, *supra*, has not answered the question as to whether a conspiracy charge whose time parameters overlap with those cited in an enterprise charge must necessarily be a lesser included predicate offense.

The present case raises precisely this issue. Specifically, the government witnesses repeatedly acknowledged that petitioner was not an organizer or supervisor of the Lavin cocaine ring charged as an 846 conspiracy in Count One of the indictment. Rather, the government theory was that the defendant supervised a distinct enterprise. This acknowledgement was important because it thus meant that defendant could be a co-conspirator

and guilty of Count One without supervising or managing the activities of five or more of his co-conspirators. The trial court's instruction that to find the defendant guilty of the enterprise charge, the jury must convict him of the conspiracy charge as a predicate, was thus clearly error. The jury, in light of the court's instructions, must have improperly utilized the conspiracy charge in Count One as a predicate offense, and thus improperly found there to be a series of violations for purposes of the enterprise conviction.

CONCLUSION

To let petitioner's conviction stand in light of the clearly established precedent precluding reference to polygraph requirements of plea agreements, and in light of the confusion generated by the court's charge as to the relationship between the broad conspiracy charged in Count One which was distinct from the enterprise charged in Count Fifty-Six would be to sanction the lower court's departure from accepted standards of due process in the course of judicial proceedings. For each of the foregoing reasons, petitioner William Motto prays that this Court grant his petition for a writ of certiorari to review the judgment and affirming decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
MARC DURANT
JACK A. MEYERSON
Attorneys for Petitioner



APPENDIX



**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NOS. 86-1182 and 86-1183

UNITED STATES OF AMERICA

v.

VITO MIRRO, -

Appellant in 86-1182

UNITED STATES OF AMERICA

v.

**WILLIAM MOTTO, a/k/a Billy Motto, Billy Martino,
Billy South Philly, B.S.P., Downtown**

William Motto,

Appellant in 86-1183

**On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Criminal Nos. 85-00214-06 and 85-00214-02)
Honorable Anthony J. Scirica**

Argued December 19, 1986

**Before: HIGGINBOTHAM and BECKER, Circuit Judges,
and DUMBAULD, District Judge***

JUDGMENT ORDER

* Honorable Edward Dumbauld, United States District Court for the Western District of Pennsylvania, sitting by designation.

After consideration of all contentions raised by appellant in 86-1182, namely, that

(1) there was a variance between the indictment which charged one conspiracy and the proof at trial which established at least two conspiracies, and that such variance prejudiced a substantial right of appellant;

(2) the court erred in its charge to the jury on the single/multiple conspiracy issue;

(3) the court abused its discretion in denying a request for a bill of particulars identifying all co-conspirators on the conspiracy count; and

(4) the court abused its discretion by allowing the government to identify un-indicted co-conspirators who were present in the courtroom in the presence of the jury; and after consideration of all contentions raised by appellant in 86-1183, namely, that

(1) the court plainly erred in permitting the prosecution to introduce in its case-in-chief recurring evidence that co-defendants appearing as government witnesses pled guilty to the charges, including conspiracy, pending against appellant;

(2) the court plainly erred in allowing the government to bolster the credibility of its witnesses by eliciting testimony that their plea agreements required them to take polygraph examinations if they did not testify truthfully;

(3) the trial court improperly denied, without stating its reasoning, appellant's request for a bill of particulars as to the identities of alleged co-conspirators and subordinates;

(4) the court abused its discretion to the prejudice of defendant by permitting the surprise identification at trial of his wife, father, and other relatives and friends, who were seated in the courtroom, as being "involved in cocaine" and/or "the cocaine business";

(5) a substantial right of the defendant was prejudiced by a variance between the indictment and the government's evidence at trial;

(6) the court plainly erred by not properly instructing the jury as to the effect of the evidence of multiple conspiracies;

(7) the court plainly erred in instructing the jury that it should consider the conspiracy charge in this indictment as a predicate offense for the continuing criminal enterprise charge; and

(8) in its supplemental charge to the jury, the court coerced a minority juror to convict; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

ATTEST:

Sally Mrvos, Clerk

Dated: December 30, 1986

Now, let's go to the final count, which is count fifty-six, count fifty-six of the indictment. It charges that from in or about 1978 through 1984, the defendant, William Motto, did engage in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848.

Under Title 21, Section 848, a person engages in a continuing criminal enterprise, if he violates one or more felony provisions of sub-chapter one of chapter 13 of Title 21, United States Code. And if those violations were part of a continuing series of violations of sub-chapter 1 of chapter 12 of Title 21. And the violations were undertaken by such persons in concert with five or more other persons as to whom the person charged occupied a position of organizer or a supervisory or management position. And that the person charged obtained substantial income from such violations.

I'm going to go through this a few times to make sure that you understand all of the elements. There are five elements here.

In order for the defendant to be found guilty of a continuing criminal enterprise, in violation of Section 848, the government must prove five things beyond a reasonable doubt.

First, that the defendant committed the offenses that are charged in the indictment. You'll see the charges in the indictment. I don't ask you to look at them at this time.

Secondly, that the offenses were part of three or more offenses committed by the defendant over a definite period of time, in violation of the federal narcotics laws.

That second one again was that the offenses were part of three or more offenses.

Third, that the defendant committed the offenses together with five or more other persons. Five or more other persons.

Fourth, that the defendant acted as an organizer, supervisor, or manager of the five or more other persons.

Fifth, that the defendant obtained substantial income or resources from the violations. Fifth, that the defendant obtained substantial income or resources from the violations.

The government does not have to prove that all five or more of the other persons operated together at the same time, or that the defendant knew all of them.

The term, income and resources, means receipts of money or property.

Let me go through it in a little different way. Count fifty-six, of course, is asserted only against one defendant in this case, Mr. William Motto. In order to prove that the defendant, William Motto, engaged in a continuing criminal enterprise, the government must prove beyond a reasonable doubt, each of the following elements.

First, that the defendant, William Motto, committed one or more violations of sub-chapter 1 of chapter 13 of Title 21 of the United States Code, that are felonies. That he committed one or more violations of that chapter that are felonies. Such violations may include one, possession of cocaine with the intent to distribute it, as charged in count thirty-four of the indictment. Two, the distribution of cocaine. Three, the use of a telephone in facilitating the conspiracy to distribute controlled substances, and the distribution of controlled substances in violation of Title 21, U.S. Code, Section 843 (b). Four, the conspiracy to possess with intent to distribute and to distribute cocaine in violation of Title 21, United States Code, Section 846, as is charged in count one of the indictment.

Let me repeat that again. These violations may include one, possession of cocaine with the intent to distribute it. Two, the distribution of cocaine. I've given you the definition of those crimes. Three, the use of a telephone in facilitating the conspiracy to distribute controlled substances, and the distribution of controlled substances. I'll give you the definition of that particular crime in a moment. Four, conspiracy to possess with the intent to distribute and to distribute cocaine as charged

in count one of the indictment. I've already given you the definition of that.

The government may prove felony violations beyond those set forth in the specific counts of the indictment, but within the specific time period of the indictment. That is from 1978 to late 1984. As part of its proof of "a continuing series of violations" against the defendant, William Motto, as required under the continuing criminal enterprise charge. That's the first element that the government must prove.

The second element is that such violations by the defendant were part of a continuing series of violations of the federal narcotics laws. And the term, series, requires three or more related felony violations of the federal narcotics laws. The term, series, requires three or more related felony violations of the federal narcotics laws.

The third element of the continuing criminal enterprise charge is that the defendant, William Motto, undertook to commit such a continuing series of violations, in concert with five or more other persons, either named or un-named in the indictment. With five or more other persons, either named or un-named in the indictment. These five other persons need not have acted in concert, at the same time. In other words, the government need only show that William Motto worked in concert with five or more persons over the course of the enterprise.

Fourth, that the defendant, William Motto occupied a position as organizer, or a supervisory position, or a position of manager, with respect to such five or more other persons.

An organizer is a person who organizes or puts together a number of people engaged in separate activities, arranges them in their activities, into one essentially orderly operation or enterprise. A supervisory or managerial position is one in which a person manages or distributes or oversees the activities of others. Such superior/subordinate relationships also need not have existed at the same moment in time. Moreover, the same

type of superior/subordinate relationship need not exist between the supervisor and each of the five other persons involved.

Finally, fifth, that from the continuing series of violations, the defendant, William Motto, has obtained substantial income or resources. Substantial income or resources.

Substantial income does not necessarily mean net income, but can mean substantial gross receipts or substantial gross income. What do I mean by substantial income? What any reasonable person would consider as substantial or considerable funds, from trafficking cocaine, as an organizer or supervisor, or manager.

They are the five elements that the government must prove beyond a reasonable doubt in order to establish and to maintain the continuing criminal enterprise charge against the defendant, William Motto.

I told you that one of the crimes that the government contends Mr. Motto engaged in, and which the government contends constitutes one of the felonies which they are required to prove, was that involving the unlawful use of a telephone. Let me define for you what that crime is.